

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 25/MP/2020

Coram:

**Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of Order: 17th May, 2024

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with Article 10 of the Power Purchase Agreements dated 17.3.2010 and 21.3.2013 executed between GMR Warora Energy Limited and the Distribution Companies in the States of Maharashtra and Dadra and Nagar Haveli pursuant to liberty granted in Order dated 16.5.2019 in Petition No. 284/MP/2018.

And

In the Matter of

GMR Warora Energy Limited,
New Shakti Bhawan, Building No.302, New Uddan Bhawan,
Opp.T -3, Indira Gandhi International Airport,
New Delhi -110037

..... Petitioner

VERSUS

1. Maharashtra State Electricity Distribution Company Limited,
Fifth Floor, Prakashgadh, Plot No. G-9,
Anant Kanekar Marg, Bandra (East),
Mumbai – 400051

2. Electricity Department, Union Territory of Dadra & Nagar Haveli,
Vidyut Bhavan, Opposite Secretariat,
Silvassa, Dadra and Nagar Haveli-396230

...Respondents

Parties present:

Shri Vishrov Mukerjee, Advocate, GWEL
Shri Yashaswi Kant, Advocate, GWEL
Ms. Priyanka Vyas, Advocate, GWEL
Shri Anand Ganesan, Advocate, MSEDCL
Shri Anup Jain, Advocate, MSEDCL



ORDER

The Petitioner, GMR Warora Energy Limited, has filed the present Petition under Section 79 of the Electricity Act, 2003 (hereinafter referred to as “the Act”) read with Article 10 of the Power Purchase Agreements dated 17.3.2010 and 21.3.2013 executed between GMR Warora Energy Limited and the Distribution Companies in the States of Maharashtra and Dadra and Nagar Haveli pursuant to the liberty granted in Order dated 16.5.2019 in Petition No. 284/MP/2018 for seeking compensation for the expenditure incurred towards procurement of As-is-Where-is-Basis (AIWIB) coal and Washery coal. The Petitioner has made the following prayers:

“(a) Grant compensation along with carrying cost for the additional expenditure incurred by GWEL towards procurement of AIWIB and washery coal as set out in paragraphs 24 and 25;

(b) Grant compensation for additional expenditure to be incurred by GWEL towards procurement of AIWIB and washery coal for future;

(c) Direct MSEDCL and DNH to pay 80% of the amount set out in paragraphs 24 and 25, forthwith subject to outcome of the Petition;

(d) Restore GWEL to the same economic position in terms of Article 10 of the PPAs;

(e) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.”

Submissions of the Petitioner

2. The Petitioner has mainly submitted as under:

(a) The Petitioner, GWEL (formerly known as EMCO Energy Limited), a generating company, has developed a coal-based thermal power plant with an installed capacity of 600 MW in Warora Taluka, District Chandrapur in the State of Maharashtra (the “Project”). The Project comprises two units of 300 MW each. Units 1 and 2 of the Project were commissioned on 19.3.2013 and 1.9.2013, respectively.

(b) On 13.1.2014, GWEL filed Petition No. 8/MP/2014 before this Commission seeking compensation for the Change in Law events occurring during the construction period and operating period. On 1.2.2017, this Commission passed an Order in Petition No. 8/MP/2014 disallowing certain Change in Law claims of GWEL, including shortfall in linkage coal and change in coal quality based on MoEF&CC notification. GWEL preferred Appeal No. 111 of 2017 before the Appellate Tribunal for Electricity (“the APTEL”) challenging the disallowance of the claims by this Commission vide Order dated 1.2.2017. Further, Respondent No. 2, DNH Power Distribution Company Ltd. (“DNH”) had filed Appeal No. 290 of 2017 challenging allowance of certain Change in Law events by this Commission by Order dated 1.2.2017. Respondent No. 1, Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) did not challenge the order dated 1.2.2017.

(c) On 14.8.2018, the APTEL passed judgment in Appeal Nos. 111 of 2017 and 290 of 2017 allowing, *inter alia*, the following claims in favour of GWEL and remanding the matter to this Commission for computation:

- (i) Shortfall in linkage coal;
- (ii) Change in coal quality based on MoEF&CC notification;
- (iii) Busy Season Surcharge and Development Surcharge; and
- (iv) Carrying cost.

(d) Pursuant to the judgment dated 14.8.2018 in Appeal No. 111 of 2017, on 29.8.2018, GWEL filed Petition No. 284/MP/2018 before this Commission. The Commission, vide its order dated 16.5.2019 in Petition No. 284/MP/2018, set out the mechanism for compensation in relation to the aforesaid claims. In terms of the said Order dated 16.5.2019, the methodology for computing compensation on account of shortfall in linkage coal included compensation on account of As-Is-Where-Is-Basis (AIWIB) coal and Washery Coal. However, particulars regarding As-Is-Where-Is-Basis coal and washery coal were yet to be compiled, the Commission granted the liberty to GWEL to approach with relevant documents in order to determine the impact.

(e) The Commission, in the said order dated 16.5.2019 *inter-alia*, allowed compensation to GWEL for the shortfall in linkage coal for the period before and

after 31.3.2017. In this regard, the Commission also set out the methodology for computing the compensation due to GWEL. In terms of the above, the Commission had inter-alia allowed the Change in Law compensation for shortfall in supply of coal and deviation in NCDP with liberty to approach the Commission with the documents of AIWIB (As is where is basis) and washery coal for the purposes of ascertaining the impact of AIWIB and washery coal, in accordance with the directions of the APTEL vide judgment dated 14.8.2018 in Appeal No. 111/2017 and the Commission`s order in Petition No. 284/MP/2018.

(f) Prior to the bid deadline, the New Coal Distribution Policy (NCDP), 2007 assured 100% of the normative requirement of coal to GWEL. The Project is covered under Para 2.2 of the NCDP since there was assurance of 100% coal linkage. Due to the amendment of NCDP 2007 by NCDP 2013, the said assurance was reduced from 100%. Accordingly, GWEL was compelled to procure coal from other sources like e-auction, open market, coal supplied by SECL through road as a mode of transportation (viz. AIWIB coal, coal through washery circuit, beyond trigger level coal, additional coal, etc.) at a much higher price than the price of linkage coal (i.e., linkage coal supplied by SECL through rail transportation mode under FSA) to fulfil its power supply obligations under the PPAs. The amendment of NCDP, 2007, has already been held to be a Change in Law event by the Hon'ble Supreme Court in the case of Energy Watchdog v. CERC, [(2017) 14 SCC 80]. Consequently, the cost of power supply by GWEL to the Procurers has increased significantly and GWEL ought to be compensated for it in line with the Change in Law provisions under the PPAs.

(g) As per Article 10.2.1 of the PPAs, in case of a Change in Law, the party affected by such Change in Law event shall be restored to the same economic position as if such Change in Law event has not occurred. Article 10 of the MSEDCL and DNH PPAs provides that a party affected by a Change in Law is entitled to compensation so as to restore the affected party to the same economic position had such Change in Law event not occurred. The term 'to restore' would entail GWEL being compensated, taking into account AIWIB coal and washery coal.

(h) In addition to the linkage coal supplied by SECL in terms of the LOA and FSA, SECL has also, from time to time, offered coal to the power projects (by publishing notifications) on AIWIB through road transportation mode. GWEL has been procuring this AIWIB coal since February 2015 in order to overcome the shortfall in linkage coal. Similarly, SECL has also been supplying additional coal to GWEL through a washery circuit, beyond trigger level coal, additional coal, etc., and AIWIB coal and washery coal are much cheaper than the open market and e-auction coal. Hence, GWEL exercised its option to procure this AIWIB coal and washery coal from SECL, with a view to minimize the overall average cost of coal procurement and resultant impact on account of additional cost pass through on the PPA beneficiaries. It is noteworthy that if such coal was not accepted by GWEL, then GWEL would have no option but to procure the equivalent quantum of coal from the open market at a significantly higher cost, which would have invariably resulted in higher cost pass through on the PPA beneficiaries under Change in Law events. GWEL has acted prudently by accepting AIWIB coal and washery coal in the best interest of the beneficiaries under the PPA. The Petitioner has submitted the details of the quantity of AIWIB and washery coal procured by GWEL and the corresponding expenses incurred for the period - February 2015 to May 2019.

(i) GWEL incurred an expenditure of Rs. 113.76 crore towards AIWIB coal and Rs. 510.42 crore towards washery coal for the period 2014-15 to May 2019. The actual invoices, being voluminous, are not being filed. GWEL undertakes to submit these invoices to MSEDCL and DNH at the time of reconciliation. Further, GWEL undertakes to furnish such invoices and information as this Commission directs. Per Mcal, the cost of AIWIB & washery coal is less than the per MCal cost of Open market coal, e-auction coal, and imported coal. Therefore, the usage of AIWIB and washery coal has resulted in a lower cost of generation from the alternate coal, reducing the burden on Beneficiaries.

(j) GWEL is entitled to compensation from MSEDCL and DNH on account of AIWIB and washery coal, as given in the tables below. The compensation has been computed by applying the formula prescribed in order Petition No. 284/MP/2018 by considering the difference in ECR Quoted and ECR (Other Coal) taking into consideration AIWIB coal and washery coal:

(A) MSEDCL PPA

(Rs. in crore till August, 2019)

Particulars	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Compensation	5.71	26.45	0.58	0.87	19.68	3.92
Total	57					

(B) DNH PPA

(Rs. in crore till August, 2019)

Particulars	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Compensation	-	4.65	17.24	(0.01)	(0.93)	12.80	2.53
Total	36						

(k) While the Commission has given in-principle approval for the washery and AIWIB coal, the liberty was granted to GWEL to approach the Commission with details and documents of AIWIB and washery coal. Accordingly, in the present Petition, all documents/details have been filed. The compensation on account of AIWIB and washery coal ought to be granted so that GWEL is restored to the same economic position in line with Article 10.2.1 of the PPAs. any mechanism that results in under-recovery/non-restoration of the affected party will be contrary to the provisions of the PPAs. In this regard, the Petitioner has placed reliance on the judgment of the Hon`ble Supreme Court in the cases of *Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power Ltd.*, [(2019) 5 SCC 325] and Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled *Sasan Power Limited vs. CERC & Ors.* Further, a similar dispensation has been granted by the Commission in Order dated 3.6.2019 passed in Petition No. 156/MP/2018 titled *M.B. Power (Madhya Pradesh) Ltd. v. Uttar Pradesh Power Corporation Ltd. & Ors.*

(l) Carrying cost has already been allowed by the APTEL in the judgment dated 14.8.2018 in Appeal No. 111 of 2017. Accordingly, GWEL is entitled to carrying costs corresponding to the claims enumerated in the foregoing Paras. GWEL has used the following methodology to arrive at the compensation corresponding to carrying cost:

$$\text{Carrying Costs} = \sum P_N \times r/12 \quad (N = 1 \text{ to Date of issuance of Order})$$

Where:

P_N = Principal outstanding towards any Change in Law event till the end of Nth month.

r = Actual Rate of Interest

A. Carrying cost under MSEDCL PPA

(Rs.in crore till August, 2019)

Particulars	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Carrying Cost	0.06	2.79	4.16	4.02	5.33	2.86
Total	19					

B. Carrying cost under DNH PPA

(Rs.in crore till August 20)19

Particulars	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Carrying Cost	0.05	2.00	2.79	2.64	3.38	1.81
Total	13					

Hearing dated 12.2.2020

2. The matter was heard on 12.2.2020. The Commission, after hearing the learned counsel for the Petitioner, admitted the Petition and directed the issue of notice. The learned counsels appearing for Respondents, MSEDCL & DNH, accepted notice on behalf of Respondents and prayed for four weeks' time to file their replies in the matter.

Hearing dated 25.8.2020

3. The matter was subsequently heard on 25.8.2020. During the course of the hearing, the learned counsels for the Respondents, Maharashtra State Electricity Distribution Company Limited and Dadra and Nagar Haveli, sought liberty to file their respective replies. Pursuant to the liberty granted by the Commission, Respondents, DNH Power Distribution Company Limited (previously the Electricity Department of Union Territory of Dadra and Nagar Haveli), and MSEDCL filed their respective replies in the matter. In furtherance of the said replies, the Petitioner has filed its rejoinder (s) respectively.

Hearing dated 27.8.2021

4. During the course of the hearing, the learned counsel for the Petitioner submitted that MSEDCL owes approximately Rs. 57 crore towards the principal amount and Rs. 19 crore towards the carrying cost for AIWIB coal and washery coal. Also, DNH owes approximately Rs. 36 crores towards the principal amount and Rs. 13 crores towards the carrying cost for AIWIB coal and washery coal. The

reconciliation process of the claims being a long-drawn process, it would be appropriate that Respondents may be directed to release the amount, which may be subject to the outcome of reconciliation. Also, in case of the disputed amount under the bill, the disputing entity ought to approach the Commission for resolving the issue instead of requiring the generating station to approach the Commission for the release of the payment. Learned counsel for the Petitioner submitted that the Petitioner had furnished all the details as to the quantity of coal procured, costs incurred, normative parameters, auditor certificate, Form 15 as per the Tariff Regulations, sample invoices, etc.

5. Learned senior counsel for Respondent No.1, MSEDCL, mainly submitted that no requisite detail has been furnished by the Petitioner with regard to AIWIB and washery coal in terms of the direction of the Commission vide order dated 16.5.2019. In support of its claim, the Petitioner has merely furnished an auditor certificate. It appears that both the AIWIB coal as well as the washery coal were being considered by the Petitioner as part of linkage coal supplied to the Petitioner by SECL. Even in the supplementary bill dated 30.5.2019, as raised by the Petitioner pursuant to the Commission's order dated 16.5.2019, whereby the differential impact for computation for a shortfall in linkage coal had been claimed, the actual firm linkage is being reflected by including both AIWIB coal as well as washery coal. There is no clarity as to whether the AIWIB coal and washery coal were part of the linkage coal or alternate coal procured on account of a shortfall in linkage coal. In the earlier case, the Petitioner is not entitled to raise a claim of washery coal and AIWIB coal by projecting it as being used as alternate coal. However, in the latter case, there can be no dispute as to the claim of the Petitioner in view of the Commission's order dated 16.5.2019. However, no supporting documents providing the requisite clarity have been placed on record by the Petitioner in this regard. The Primary obligation of providing the requisite details in support of its claims is on the Petitioner itself, and, thus, there cannot be any direction of upfront payment, which may be subject to the outcome of reconciliation.

6. Learned counsel for Respondent No.2, DNH Power Distribution Company Limited, mainly submitted that pursuant to the APTEL decision and prior to the order of the Commission dated 16.5.2019, the Petitioner had on 16.2.2019 raised the supplementary bills claiming compensation for Change in Law including 100% of its

claim for shortage coal (for the period from April 2013 to March 2019) for an amount of Rs. 72.47 crore. However, subsequent to the order of the Commission, wherein the Commission did not grant any relief for AIWIB coal and washery coal, the Petitioner raised a supplementary bill on 30.5.2019 for coal shortage to the tune of Rs. 78.15 crore for the same period from April 2013 to March 2019. Surprisingly, the claim amount had been increased instead of decreasing. Even in Form 15 as furnished by the Petitioner, it has unilaterally added the various other components over and above as provided in Form 15 notified by the Commission in the Tariff Regulations. After being pointed out, the Petitioner, in rejoinder, has furnished the details under Form 15 of the 2019 Tariff Regulations instead of Form 15 of the 2014 Tariff Regulations as applicable in the present case. It is noticed that on many occasions, per MT landed cost of AIWIB coal and washery coal had been lower than per MT landed cost of the linkage coal. However, the Petitioner has unilaterally included the various additional components thereon. No requisite details have been furnished by the Petitioner in terms of the order of the Commission dated 30.5.2019, such as invoices of AIWIB coal and washery coal, transportation invoices, detailed computation as per Form 15 of 2014 Tariff Regulations, and GCV, etc. The Petitioner has merely provided two sample invoices in support of its claims.

7. In rebuttal, the learned counsel for the Petitioner submitted that since in the order dated 30.5.2019 in Petition No. 284/MP/2018, AIWIB coal and washery coal have been treated as 'other' coal, there is no question of whether they are part of linkage coal or outside of linkage coal. He further submitted that on the basis of the same Form 15, which Respondents are now disputing, payments towards other Change in Law claims have been paid by Respondents. As to the inclusion of AIWIB coal and washery coal under the linkage coal in the supplementary invoices, learned counsel submitted that since the compensation for AIWIB coal and washery coal was to be determined in terms of the liberty granted by the Commission in order dated 30.5.2019, AIWIB coal and washery coal were booked under the head of linkage coal and the Petitioner only claimed the bid energy charges for such coal in its invoices and did not include the actual cost (incremental) of AIWIB coal and washery coal in coal cost pass through compensation. The learned counsel also added that, as per his instructions, all the invoices/bills pertaining to AIWIB coal and washery coal had been already provided to the Respondents. Accordingly, the learned counsel requested to direct Respondents to pay at least 50% of the outstanding

amount and the balance amount can be released subject to the reconciliation process.

8. Considering the submissions made by the learned counsels for the parties, the Commission directed the Petitioner to share all the invoices/bills relating to the procurement of AIWIB coal and washery coal and indicate the quantum of coal procured under the linkage and AIWIB & washery basis with the Respondents and the Respondents were directed to 'complete their verification/reconciliation process and to file the outcome of their verification process after serving a copy to the Petitioner. It is expected that the parties would diligently pursue the matter for reconciliation of the computation issue as per the direction of the APTEL, and in the alternate come up with an agreed agency to be nominated by this Commission for reconciling the computation issue'.

9. Pursuant to the direction given by the Commission, Respondent No.2, DNH Power Distribution Company, and Respondent No. 1, MSEDCL, filed their replies dated 23.9.2021 & 10.11.2021, respectively.

Hearing dated 16.11.2021

10. During the course of the hearing, learned senior counsel for Respondent, MSEDCL, sought permission to file/ upload its response. Learned counsel for the Respondent, DNHPDCL, submitted that DNHPDCL has already filed its affidavit in the month of September 2021. Learned counsel for the Petitioner requested four weeks' time to file its response to the affidavits filed by MSEDCL and DNHPDCL and submitted that the matter may be taken up for the hearing thereafter. Considering the request of the learned senior counsel for the Respondent, MSEDCL, the Commission directed the Respondent to file its affidavit within two days. The Commission further directed the Petitioner to file its response on the affidavits filed by the Respondents by 17.12.2021 after serving a copy to the other side. Pursuant to the liberty granted by the Commission, the Petitioner vide its rejoinder (s) dated 7.3.2022 had filed the voluminous data in response to the replies filed by both the Respondents.

Hearing dated 24.3.2022

11. During the course of the hearing, the learned counsel for Respondent, DNHPDCL, submitted that the Petitioner filed an additional affidavit containing the various data running approximately 2000 pages on 7.3.2022 and thus, Respondent may be permitted some time to verify such data and to file the response, if necessary. In response, the learned counsel for the Petitioner prayed to direct the Respondents to pay at least 50% of the outstanding claimed amount forthwith.

12. Learned counsel for Respondents, DNHPDCL and MSEDCL opposed the request of the Petitioner for interim payment at this stage. Learned counsel submitted that despite the direction of the Commission in an order dated 16.5.2019 in Petition No. 284/MP/2018 to approach with all the information/particular to determine the impact/ compensation of AIWIB and washery coal, the Petitioner filed the present Petition bereft of requisite data/details. After hearing the learned counsels for the parties and considering that the Petitioner has filed its response along with the voluminous details on 7.3.2022, the Commission granted two weeks' time to the Respondents to examine such details and to file their comments, if any.

Hearing dated 24.5.2022

13. During the course of the hearing, the learned counsel for the Petitioner sought time to file additional information/documents and to fresh vakalatnama in the matter.

14. Learned counsel for Respondents submitted that Respondent, MSEDCL, may be permitted a week's time to file its affidavit in response to the Petitioner's affidavit filed on 7.3.2022. Learned counsel further requested that Respondents may also be permitted sufficient time to examine and file their response, if required, to the additional information/documents to be filed by the Petitioner.

15. Considering the request of the learned counsel for the parties, the Commission permitted Respondent, MSEDCL to file its affidavit with a copy to the Petitioner and the Petitioner to file a rejoinder thereafter. The Commission further permitted the Petitioner to file the additional information/documents and fresh vakalatnama with a copy to the Respondent, who may file their response, if any, thereafter.

16. Pursuant to the liberty granted by the Commission, the Petitioner had filed an additional affidavit dated 15.9.2022 for placing on record the Report on Review of Coal Statements and Supporting Documents for GMR Warora Coal Based Thermal Power Plant issued by ABPS Infrastructure Advisory Private Limited dated 8.8.2022.

Hearing dated 6.10.2022

17. During the course of the hearing, the learned counsel for Respondent No.1, MSEDCL requested for an adjournment on the grounds of the non-availability of the arguing senior counsel in the matter. The learned counsel further submitted that the Petitioner vide affidavit dated 15.9.2022 has filed a Report on 'Review of Coal Statements and Supporting Documents for GMR Warora Coal Based Thermal Power Plant' and Respondent may be granted some time to file its response thereon. The said request was not objected to by the learned counsel for the Petitioner. Learned counsel for Respondent No. 2, DNHPDCL prayed for four weeks to file a response to the Report filed by the Petitioner vide affidavit dated 15.9.2022. Considering the submissions made by the learned counsel for the parties, the Commission adjourned the matter and directed the Respondents to file their concise response to the Petitioner's affidavit dated 15.9.2022 with a copy to the Petitioner.

Hearing dated 28.11.2023

18. During the course of the hearing, the learned counsel for the Petitioner submitted that pursuant to the direction of the Commission, the parties had engaged in discussion for reconciliation of the Petitioner's outstanding claims, and the Respondent, MSEDCL, in its reply dated 11.9.2023, has admitted to the provisional differential impact of Rs.58.01 crore as against the claim of Rs. 58.91 crore for the period from February 2015 to June 2020. The difference with respect to Rs. 0.18 crore is primarily due to non-consideration of expenditure towards liaising with SECL and IR. Similar to the unloading, sampling, and AMM charges, liaising costs are also being incurred by the Petitioner in connection with the procurement of coal, and this Commission has in the past approved the inclusion of charges such as handling and sampling charges, etc., which are incidental to the procurement of coal under the Tariff Regulations, 2014. MSEDCL ought to be directed to pay the Petitioner at least the admitted principal of Rs. 58.01 crore as compensation for the

cost incurred till June 2020 towards procurement of AIWIB coal and washery coal by the Petitioner. Insofar as carrying cost is concerned, the said issue is no longer *res-intergra* and stands settled in terms of the catena of judgments of the Hon'ble Supreme Court. The Petitioner is entitled to carrying cost from the effective date of Change in Law events/date when the Petitioner incurred the expenditure on account of Change in Law event. As on 31.10.2023, the Petitioner's claim for carrying cost works out to Rs. 63 crore. Insofar as the reconciliation with Respondent, DNH is concerned, the said PPA has already expired by efflux of time, and the Petitioner and DNH are still engaged in the reconciliation process to settle the outstanding claims/ dues, including but not limited to claims pending adjudication in the present proceedings. Hence, the Commission may dispose of the present petition as withdrawn qua DNH due to pending reconciliation between the parties while granting liberty to the Petitioner to approach the Commission in the event parties do not reach an amicable settlement.

19. Learned counsel for Respondent, MSEDCL submitted that pursuant to the direction of the Commission, MSEDCL and the Petitioner have reconciled the Petitioner's compensation claims, and MSEDCL has admitted the differential financial impact of Rs.58.01 crore on a provisional basis, which may change/modify subject to further audit. Insofar as payment of the aforesaid provisional reconciled amount is concerned, MSEDCL will abide by any directions issued by the Commission in this regard. However, MSEDCL has also raised certain objections towards such claims of the Petitioner in its reply, which may also be considered by the Commission. In an earlier round of litigation, i.e., in Petition No. 284/MP/2018, both AIWIB and washery coal were being considered as part of the linkage coal by the Petitioner itself. Hence, it would not be appropriate to consider the AIWIB coal and washery coal as alternate coal. Moreover, there is nothing to distinguish or segregate between the quantum of AIWIB & washery coal and the linkage coal. As per the Petitioner, there was no specific need to use washery coal additionally to attend the norms specified in the MoEF&CC Notification dated 4.2.2014 as the Petitioner, by using the imported coal along with linkage coal, was already achieving the norms set out, i.e. quarterly ash content below 34%. Insofar as carrying cost is concerned, the parties may also be permitted to reconcile the carrying cost amount.

20. In response, learned counsel for the Petitioner mainly submitted that the Commission, in its order dated 16.5.2019 in Petition No. 284/MP/2018, has already allowed the AIWIB coal and washery coal as an alternate coal subject to the Petitioner furnishing additional documents/information to determine the compensation, which the Petitioner has furnished in the present Petition. The said order has also been affirmed by the APTEL vide its Judgment dated 14.8.2018 in Appeal Nos. 111 of 2017 and Anr. and by the Hon'ble Supreme Court by judgment dated 20.4.2023 in the case of GMR Warora Energy Ltd. & Ors. v. CERC & Ors. [2023 SCC Online SC 464]. Pending a final decision in Petition No.284/MP/2018, since the Petitioner was using AIWIB coal and washery coal along with linkage coal, AIWIB and washery coal were billed at ECR as per the PPA. This was necessary; otherwise, there would have been a mismatch in Form 15 in terms of coal utilised and actual generation. The said amount, however, did not include the incremental cost towards AIWIB coal and washery coal. In the present case, the Petitioner has claimed only the incremental cost of AIWIB coal and washery coal. As such, the Petitioner has no objection towards reconciling its carrying cost claim. However, time bound directions may be issued for completing such reconciliation exercise.

21. Learned counsel for the Respondent, DNH, did not object to Petitioner's request for withdrawal of the Petition *qua* DNH due to the pendency of reconciliation between the parties with the liberty to approach the Commission in the event the parties do not reach an amicable settlement.

22. Considering the submissions made by the learned counsel for the parties, the Commission ordered (a) MSEDCL to pay Rs. 46.41, i.e. 80% of the admitted principal differential impact of Rs.58.01 crore subject to the outcome of the present Petition, (b) the Petitioner and MSEDCL to carry out the reconciliation of the carrying cost claim of the Petitioner and to file an outcome of such exercise, and (c) with regard to the Petition as withdrawn *qua* DNH, the Petitioner to file its submission on an affidavit in this regard.

23. Pursuant to the above direction of the Commission, the Petitioner vide its additional affidavit dated 22.12.2023 had mainly submitted that the Petitioner prays to withdraw the present Petition *qua* GWEL's claims liable to be paid by DNH in lieu

of the ongoing reconciliation between the parties, with liberty to approach this Commission, in the event the parties are unable to reach an amicable settlement.

Hearing dated 16.2.2024

24. Learned counsel for the Petitioner submitted that pursuant to the direction of the Commission, the Petitioner and the Respondent, MSEDCL, have reconciled the principal amount as well as carrying cost towards the Petitioner's claims for the incremental expenditure incurred on 'As-is-Where-Is-Basis coal and Washery coal.' Learned counsel submitted that insofar as the principal amount is concerned, out of the total claim of Rs. 58.19 crore, MSEDCL has admitted to the principal amount of Rs. 58.01 crore and has made a payment of Rs. 46.41 crore (80% of the admitted amount) as per the Record of Proceedings for the hearing dated 28.11.2024. Further, MSEDCL has computed and admitted the carrying cost of Rs. 65.48 crore, which is agreeable to the Petitioner. Learned counsel submitted that as regards the balance Rs. 0.18 crore towards the principal amount, the Petitioner is willing to waive its right to claim such differential amount in furtherance to the spirit of reconciliation and with the objective to arrive at a settlement in this long standing matter only, which shall not be taken as a precedent. Learned counsel added that for the purpose of verification of the actual rate of interest paid by the Petitioner, MSEDCL has sought the agreements executed by the Petitioner with lending banks for the actual interest paid to the lenders. However, since these agreements as such do not indicate the actual rates, the Petitioner will provide the working capital lenders' certificates demonstrating the actual interest paid to the lenders in terms of these agreements.

25. Learned counsel for the Respondent, MSEDCL, confirmed and reiterated the submissions made by the learned counsel for the Petitioner and further requested that the Petitioner be asked to provide the certificates from its working capital lenders as proofs of the actual rate of interest paid by the Petitioner as per the agreements executed with the lenders.

26. Considering the submissions made by the learned counsel for the parties, the Commission permitted the Petitioner to provide Respondent, MSEDCL, the certificates from its working capital lenders, as agreed above. The parties were directed to file their brief submissions (not exceeding three pages) along with the

reconciled amount of interest amount. The Commission directed Respondent, MSEDCL, to indicate a timeframe for making payment of the admitted amounts towards the balance principal amount of Rs. 11.60 crore and the carrying cost in its submissions.

27. In compliance with the above direction, Respondent No.1, vide its response dated 28.3.2024, has mainly submitted that pursuant to this Commission's directives, MSEDCL has paid Rs. 46.40 crore to the Petitioner towards 80% of the admitted principal amount on 26.12.2023. The Petitioner, vide email dated 20.2.2024, has submitted the certificates of its working capital lenders, namely, Axis Bank, Union Bank of India, UCO Bank, and Bank of Baroda to MSEDCL, indicating the rate of interest charged on cash credit/WCDL Limits utilized by GWEL during the period February 2014/March 2014 to December 2023 maintained with their bank. Accordingly, MSEDCL has tried to verify the actual interest rates from these lender's certificates by comparing them with the Auditor's certificate submitted by GWEL. However, during verification, it was further observed that there was a need to understand the mechanism on the basis of which such higher interest rates were decided and charged by all consortium banks upon GWEL during the period February 2014/March 2014 to December 2023. During the course of the hearing dated 16.02.2024 the learned counsel of MSEDCL agreed to verify the actual rate of interest from the lender's certificates of GWEL, however, MSEDCL could not completely verify the actual rate of interest paid from these lender's certificates for want of few more additional documents in support of the mechanism for deciding the higher interest rates by consortium banks such as sanction letters of all lending banks, agreements of all consortium banks, details of overnight/1M/3M/6M/1Y/2Y/3Y base rate/MCLR of all consortium banks or any other document for clarification of interest rate mechanism. Therefore, MSEDCL, jointly with GWEL, had a meeting on 27.2.2024 for discussion regarding the submission of the additional documents in support of the actual rate of interest, and GWEL also agreed to submit these additional required documents to MSEDCL after discussing with its legal team. Since no positive response was received from GWEL, MSEDCL could not completely verify and ascertain the actual rate of interest paid by GWEL. Subsequently, the reconciliation of the carrying cost claim of Rs. 64.18 crore could not be completed within the stipulated time. Though GWEL has not yet responded positively regarding the submission of the additional documents, pursuant to the Commission's directives

dated 16.02.2024, MSEDCL will be able to make the payment towards the balance amounts of the principal claim of Rs. 11.60 crore and the provisional carrying cost claim of Rs. 64.18 crore (as on 30.11.2023) in six equated monthly instalments considering the current financial position of MSEDCL. Therefore, the Commission may direct GWEL to cooperate with MSEDCL for reconciliation of the carrying cost claim by submitting the additional documents required in support of the verification of the actual rate of interest, without which reconciliation is not possible. MSEDCL will not be responsible for any further delay in the completion of the said reconciliation process. MSEDCL reserves its right to provisionally pay the balance amount and reconcile further after verification of all required documents. GWEL is required to submit the final claim (both principal and carrying cost) through a supplementary invoice after passing the judgment and the same will be further verified, audited and then payment will be made/reimbursed to that effect.

Written submissions of the Petitioner

28. Pursuant to the liberty granted by the Commission, the Petitioner, vide its written submission dated 4.3.2024, has reiterated its submissions made in the pleadings and additionally has submitted as under:

A. Principal amount payable by MSEDCL

(a) Without prejudice, GWEL is willing to waive its right to claim the differential payment of Rs. 0.18 crore in furtherance of the spirit of reconciliation and with the objective of arriving at a settlement in the matter and accepting the outstanding principal amount of Rs. 58.01 crore. This waiver ought not to be taken as a precedent and is to be treated as an isolated exception only for the present Petition.

(b) Pursuant to directions of the Commission in Record of Proceedings (ROP) for the hearing dated 28.11.2023, MSEDCL has paid Rs. 46.41 crore (80% of the admitted principal amount) to GWEL on 26.12.2023. Given that parties have agreed to the outstanding amount of Rs. 58.01 crore. The Commission ought to direct MSEDCL to pay the balance principal amount of Rs. 11.6 crore within 2 weeks from the date of passing of the final Order in the present Petition.

B. Carrying Cost payable by MSEDCL

(c) MSEDCL, vide its affidavit dated 29.12.2023, has computed and admitted the carrying cost of Rs. 65.48 crore (calculated till 30.11.2023) basis the admitted principal amount of Rs. 58.01 crore in line with the methodology prescribed in an order dated 16.5.2019 in Petition No. 284/MP/2018. However, the said admitted amount was subject to verification of the actual rate of interest paid by GWEL.

(d) The Commission, vide ROP dated 16.2.2024, directed GWEL to furnish the certificates from its Working Capital Facility lenders as proof of the actual rate of interest paid by GWEL. In compliance, GWEL has furnished the certificates from its Working Capital Facility lenders to MSEDCL on 20.2.2024 so as to enable MSEDCL to verify/recompute the carrying cost (calculated till 30.11.2023) payable by it. Accordingly, the Commission may direct MSEDCL to pay the outstanding carrying cost of Rs. 65.48 crore (calculated till 30.11.2023), as admitted by MSEDCL vide affidavit dated 29.12.2023, within two weeks from the date of passing of the final order in the present Petition.

(e) For the balance period, i.e., from 1.12.2023 until the date of the final order, the carrying cost is to be computed as per the agreed methodology used for computation of carrying cost for the period until 30.11.2023, based on the certificate from Working Capital Facility lenders, as per the invoice raised by GWEL.

(f) In view of the foregoing, the Commission may: -

(i) Hold and declare that AIWIB and washery coal form part of and are to be included in "Other" coal for purposes of computation of compensation payable to GWEL as per the Order dated 16.5.2019 in Petition No. 284/MP/2018.

(ii) Direct MSEDCL to pay GWEL the balance principal amount of Rs. 11.6 crore within 2 weeks from the date of passing of the final Order in the present Petition.

(iii) Direct MSEDCL to pay carrying cost of Rs. 65.48 crore (computed till 30.11.2023) as admitted by MSEDCL vide affidavit dated 29.12.2023, within two weeks from the date of passing of the final order in the present Petition.

(iv) For the period from 1.12.2023 till the passing of the final order, carrying cost is to be computed as per the methodology used for computation of carrying cost for the period till 30.11.2023, basis the certificate from WC lenders to be paid as per the invoice raised by GWEL, post-issuance of the final order.

Analysis and Decision

29. Prior to delving into the issues involved in the matter, it may be pertinent to note that the Petitioner, during the course of the hearing dated 28.11.2023, had submitted that since the PPA with Respondent, DNHPDCL has already expired by efflux of time and the Petitioner and DNHPDCL are still engaged in the reconciliation process to settle the outstanding claims/dues including but not limited to claims pending adjudication in the present proceedings, the Commission may dispose of the present Petition as withdrawn qua DNH due to pending reconciliation between the parties while granting the liberty to the Petitioner to approach the Commission in the event parties do not reach an amicable settlement. Further, the Petitioner, vide its additional affidavit dated 22.12.2023, has placed on record a submission to the above effect. Considering the above, we restrict ourselves to the prayers of the Petitioner qua Respondent, MSEDCL only, and grant the liberty to the Petitioner to approach the Commission in the event the parties, i.e., the Petitioner and DNHPDCL, do not reach an amicable settlement.

30. We have considered the submissions made by the parties and perused the documents placed on the record. After considering the submissions of the parties and perusal of the documents placed on the record, the following issues arise for consideration:

Issue No. 1: Whether the Petitioner is entitled to compensation for additional costs incurred towards AIWIB and Washery Coal?

Issue No. 2: Does the contention of the Respondent, MSEDCL with regard to insufficiency or lack of supporting detail/information survive?

The above issues have been dealt with in the subsequent paragraphs.

Issue No. 1: Whether the Petitioner is entitled to compensation for additional costs incurred towards AIWIB and Washery Coal?

31. Respondent No.1, MSEDCL, has *inter alia* questioned the entitlement of the Petitioner to the compensation for the additional cost incurred towards AIWIB and Washery coal on merits, which can be categorised into the following:

32. The following issues have been raised by the MSEDCL regarding the compensation for an additional cost of AIWIB and Washery Coal:

- (a) The Petitioner itself considered Washery and AIWIB Coal as linkage coal.
- (b) Washing Charges vis-à-vis linkage coal.
- (c) Liability under the Environment (Protection) Amendment Rules, 2014.

(a) The Petitioner itself considered Washery & AIWIB Coal as linkage coal

33. Respondent, MSEDCL has submitted that from the bare reading of the averments and case so put forth by the Petitioner before this Commission in the earlier round of litigation, i.e., in Petition No. 284/MP/2018, it is evident that both the AIWIB as well as Washery coal was being considered as part of linkage coal by the Petitioner. Furthermore, even the Supplementary Bills so raised by the Petitioner in terms of the order dated 16.5.2019 passed by this Commission in Petition No. 284/MP/2018 do clearly indicate the same understanding of the Petitioner with the Respondent that both the AIWIB as well as Washery Coal are part of linkage coal so supplied by SECL under the FSA which the petitioner has also confirmed. Accordingly, in the supplementary bill dated 30.5.2019 raised by the Petitioner upon the Respondent whereby differential impact for compensation for the shortfall in linkage coal is being claimed, the actual firm's linkage is being reflected by including

both the AIWIB as well as Washery coal. Accordingly, MSEDCL has submitted that the present Petition and the claim thereof are completely contrary not only to the admitted understanding between the parties qua linkage coal but also to their own stand in Petition No. 284/MP/2018. MSEDCL has further contended that washery and AIWIB coal should not be considered as an alternate coal, leaving aside for a moment the claim cost involved, since any treatment of the same as an alternate coal by this Commission through the present Petition as envisaged by the Petitioner, would have a direct bearing on computation of the quantum of SECL supplied/offered linkage coal vis-à-vis the quantum of shortfall in supply. Furthermore, even such a consideration would be in direct contradiction to the methodology of computation approved in Paragraph No. 55 for granting compensation of Change in Law events in an order dated 16.5.2019 in Petition No. 284/MP/2018 by this Commission, as no separation of the quantum of washery and AIWIB coal was mentioned from the linkage coal.

34. In response, the Petitioner, GWEL, has submitted that in terms of the order dated 16.5.2019, this Commission had *inter-alia* allowed the Change in Law compensation for the shortfall in supply of coal and deviation in NCDP. AIWIB Coal and Washery Coal were allowed as alternate coal subject to the furnishing of additional documents/ information to determine the compensation, and the said details have been provided by the Petitioner. The Petitioner, GWEL, had not included the cost of AIWIB and Washery coal in Petition 284/MP/2018, although Washery coal and AIWIB form part of an alternate coal, and their impact was not considered by this Commission in an order dated 16.5.2019 in the absence of details. Accordingly, GWEL was granted the liberty to approach this Commission with relevant details on AIWIB coal & washery coal. However, this cannot be construed as AIWIB coal and washery coal forming part of linkage coal as per the

methodology prescribed by this Commission in the said order dated 16.5.2019, as contended by MSEDCL. The interpretation being sought to be given to Petition No. 284/MP/2018 filed by GWEL is, therefore, incorrect and unwarranted. The Commission had duly considered the contentions and supporting documents furnished by all the parties and then passed an order in Petition No. 284/MP/2018. Respondent, MSEDCL cannot, therefore, be permitted to reopen issues that have already been duly considered and decided by this Commission, especially when the order of the Commission dated 16.5.2019 has been upheld by the APTEL vide Judgment dated 13.10.2020 in Appeal No. 283 of 2019. It has been further submitted that AIWIB and Washery coal offered by SECL is over and above the linkage coal supplied, and it is reiterated that AIWIB and washery coal cost is comparatively lower than e-auction, open market, and imported coal. GWEL, in order to minimise the additional financial burden occasioned on account of procuring the alternate coal, was left with no option but to offtake the supply of AIWIB and washery coal by SECL. Respondent, MSEDCL's contention that Supplementary Bills raised by GWEL have discrepancies and do not provide information as required in terms of the order dated 16.5.2019 is also misplaced. It is stated that the Supplementary Bill dated 30.5.2019 has been raised in accordance with the order of the Commission dated 16.5.2019 and does not include billing for AIWIB and washery coal.

35. We have considered the submissions made by the parties. Indisputably, vide order dated 16.5.2019 in Petition No. 284/MP/2018, the Commission had allowed the Change in Law compensation to the Petitioner for the shortfall in the supply of coal and deviation in NCDP. The Commission, in paragraph 55 of the order in Petition No. 284/MP/2018, also prescribed a methodology for the compensation wherein under the category of 'other coal.' The Commission did not include AIWIB and washery coal due to a lack of relevant information and granted the Petitioner the

liberty to approach the Commission with the complete details on AIWIB and washery coal claimed in the impact of shortage of coal. It has been amply clarified by the Petitioner that it has been procuring AIWIB and washery coal as offered by SECL to overcome the linkage coal shortfall and to minimise the additional procurement cost of additional coal since the cost of such coal is comparatively lower than e-auction, open market, and imported coal. However, the procurement of AIWIB and Washery coal also entailed additional expenditure due to charges pertaining to the washing, transportation, handling, etc., requiring the Petitioner to incur additional costs in order to honour its obligations under the PPAs. Petitioner has also clarified that AIWIB and Washery coal offered by SECL is over and above the linkage coal supplied however, pending decision of the Commission in the present case, the Petitioner was using AIWIB and Washery coal along with linkage coal, AIWIB, and Washery coal and the same was billed at ECR as per the PPA rates only in order to avoid the mismatch in Form 15 in terms of coal utilised and generation. We notice that the Petitioner has categorically clarified that the claim by the Petitioner pursuant to the Commission's order dated 16.5.2019 did not include the incremental cost towards AIWIB and Washery coal, which has been claimed only in the present Petition. We do not find any fault with the aforesaid approach of the Petitioner. Merely because the Petitioner had billed the AIWIB and Washery coal along with linkage coal, albeit only at ECR rates, does not restrict its entitlement to claim the incremental cost incurred towards procurement of AIWIB and Washery coal upon the furnishing the requisite details/information in terms of liberty granted by the Commission in an order dated 16.5.2019. While we notice that as per the extant procedures and practices of Coal India Limited and its subsidiaries, any coal offered by them on AIWIB and Washery basis is considered towards their obligation to supply ACQ under the FSAs, at the same time opting for such coal as offered by the

coal companies may also entail additional costs and therefore, the landing cost of such coal does not compare with the landing cost of linkage coal under the FSAs. In the methodology prescribed by the Commission at paragraph 55 of the order dated 16.5.2019, the Commission has considered the linkage coal supplied under the FSA at the quoted ECR only, adopting the similar treatment for AIWIB and Washery coal may not be prudent as the Petitioner is required to be compensated for the additional cost incurred towards procuring AIWIB and Washery coal. After all, as rightly pointed out by the Petitioner, by exercising its option to procure this AIWIB and Washery coal as offered by the coal companies, the Petitioner has tried to minimize the overall average cost of coal procurement as otherwise, the Petitioner would have to have procured the equivalent quantum of coal from open market at a significantly higher cost, which would have invariably resulted in higher cost pass through on the beneficiaries. Keeping in view the above and the formula prescribed by the Commission in paragraph 55 of the order dated 16.5.2019, we are of the view that AIWIB and Washery coal have to be considered as “Other” Coal as indicated therein in order to enable the Petitioner to recover the additional expenditure incurred towards the procurement of AIWIB and Washery Coal. It is also pertinent to note that in the order dated 3.6.2019 in Petition No. 156/MP/2018 in the matter of MB Power (Madhya Pradesh) Ltd. v. UPPCL and Ors., the methodology was prescribed by the Commission for working out the compensation on account of the coal shortage included AIWIS and Washery coal as “Other” Coal. The relevant extract of the said order reads as under:

“ 105. In light of the above, we approve the following methodology duly incorporating all decision of the Commission in this matter, as under:

This methodology, as already stated above, would be applicable for all period/s covering before (under NCDP 2013) and after 31.3.2017 (as extended by Shakti Scheme):

Step - 1: ECR Linkage Coal (Delivery point) = ECR Quoted

Step - 2: ECR Other Coal (Delivery point) = $\{[GSHR / \text{Weighted Average GCV of Other Coal (i.e. imported + e-auction + others\#)}] \times [\text{Weighted Average Price of Other Coal (i.e. imported + e-auction + others\#)}] \times [1 / (1 - \text{Aux Consumption})] \times [1 / (1 - \text{Applicable Transmission Losses})]\}$
 Step - 3: ECR Chargeable (Delivery point) = $\{(G \times \text{ECR at Step - 1}) + [\text{ECR computed at Step - 2} \times (1 - G)]\}$

Where,

G = % Generation achievable based on Actual Linkage Coal received;

GSHR = Normative Gross Station Heat Rate as worked out on the basis of applicable CERC Regulations or actual, whichever is lower;

Auxiliary Consumption = Normative auxiliary consumption as per applicable CERC Regulations or actual, whichever is lower;

Weighted Average GCV of Other Coal (to be computed in line with applicable CERC Regulation) = $\{(GCV_{\text{imported}} \times Qty_{\text{imported}}) + (GCV_{\text{e-auction}} \times Qty_{\text{e-auction}}) + (GCV_{\text{others\#}} \times Qty_{\text{others\#}}) / (Qty_{\text{imported}} + Qty_{\text{e-auction}} + Qty_{\text{others\#}})\}$;

And

Weighted Average Price of Other Coal = $\{(Price_{\text{imported}} \times Qty_{\text{imported}}) + (Price_{\text{e-auction}} \times Qty_{\text{e-auction}}) + (Price_{\text{others\#}} \times Qty_{\text{others\#}}) / (Qty_{\text{imported}} + Qty_{\text{e-auction}} + Qty_{\text{others\#}})\}$

Step - 4: Compensation = $\{(\text{ECR as computed at Step - 3} \text{ minus ECR Quoted}) \times \text{Scheduled Generation at Delivery Point}\}$.

Note:

- 1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.
- 2) All facts, figures and computations in this regard should be duly certified by the auditor.
- 3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.
- 4) Total Generation Ex-bus and Scheduled generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the relevant/SCADA data of RLDC and/or Regional Energy Accounting of RPC/ RLDC for the month.
- 5) Other# implies "Coal procured through open market including but not limited to additional coal supplied by SECL (over and above regular linkage coal) through rail / road transportation mode (viz. "as-is-where-is" basis coal, coal through washery circuit, beyond trigger level coal, additional coal, etc.)"

Accordingly, in the present case also, the Petitioner is held to be entitled to the compensation towards additional expenditure incurred on account of the

procurement of AIWIB and Washery coal by considering them as “Other” coal as per the methodology prescribed in the order dated 16.5.2019 in Petition No. 284/MP/2019

(b) Washing Charges vis-à-vis linkage coal

36. Respondent, MSEDCL has submitted that the order dated 16.5.2019 on the issue of washery coal was on account of the approving the Environment (Protection) Amendment Rules, 2014 as a Change in Law event and in accordance thereof, this Commission was considering the financial impact on the Petitioner that would have been cast upon due to mandatory washing of primary linkage coal, including the cost of transportation thereof. However, since no details related to the expenses incurred towards washing the primary linkage coal were provided by the Petitioner, a liberty was granted to the Petitioner in paragraph 66 of the order to claim the impact of the implementation of Environment (Protection) Amendment Rules, 2014 vis-à-vis primary linkage coal and by no stretch of imagination, it can be extended to make a claim of AIWIB or Washery coal as alternate coal since it was never projected before the Commission during the entire proceedings. It is also submitted that if at all the Petitioner has to raise a claim of the impact of the introduction of Environment (Protection) Amendment Rules, 2014, then the same would be just limited to the cost incurred for washing and transportation of primary linkage coal to and from wash point, owing to such Change in Law eventuality. However, it cannot be claimed as the cost of washed coal being used as alternate coal.

37. In response, the Petitioner has submitted that the Respondent is conflating two issues, namely, washing coal and using washery coal as an alternate coal. However, without prejudice to the above, the Commission has also held that the MoEF&CC Notification dated 11.7.2012, subsumed by the Environment (Protection)

Amendment Rules, 2014, prescribing the ash content for coal as a Change in Law event.

38. We have considered the submissions made by the parties. As already noted above, by way of the present Petition, the Petitioner has only claimed the incremental cost of AIWIB and Washery coal, and as the Commission has already directed that the Petitioner is entitled to compensation on account of expenditure incurred towards the shortfall of linkage, the additional expenditure incurred towards procurement of AIWIB and Washery coal has to be allowed to the Petitioner, subject to the Petitioner furnishing the requisite details in terms of the liberty granted as per paragraph 55 of the order dated 16.5.2019. Evidently, the claim of the Petitioner under the present Petition is not related to the washing of linkage coal for lowering the ash content in compliance with the MoEF&CC Notification, and therefore, the submissions of the Respondent are not relevant to the present case.

(c) Liability under the Environment (Protection) Amendment Rules, 2014

39. Respondent, MSEDCL has submitted that as per the aforesaid Rules, it is the primary legal obligation of the supplier to supply coal that has ash content not exceeding 34%, and therefore, the claim, if any, towards the cost incurred for lowering the ash content in compliance with the said amendment is to be borne by the coal supplier as legal obligation to comply with on the said supplier. It has been submitted that an issue related to the quality of supplied coal (ash content exceeding 34%) between SECL and the Petitioner, including the consequential financial impact, must be redressed with SECL only and not with Respondent, being a third party to the issue. It has been also submitted by MSEDCL that the quarterly average ash content of the Petitioner for various financial years was below 34%, and the Petitioner, by using imported coal along with linkage coal, had already achieved the

norms set out and there was no specific need for using washery coal additionally to meet the norms set out in the MoEF&CC Notification dated 4.2.2014.

40. In response, the Petitioner has reiterated that MSEDCL is conflating two issues- the washing of coal and the use of washery coal. The APTEL, in its judgment dated 14.9.2020 in Appeal No. 182 of 2019 titled Adani Power Maharashtra Limited v. MERC and Ors., held that relegating the appellate to the contractual remedy under FSA when the genesis of the appellant's claim is Change in Law under the PPA would not be appropriate and the said principle is squarely applicable to the present case. It is also submitted that compliance with the MoEF&CC Notification is mandatory, and the same has also been held as a Change in Law, and the Petitioner is entitled to be compensated on account of the expenditure incurred pursuant to the same.

41. We have considered the submissions made by the parties. As noted above, the scope of the present Petition is limited to the entitlement of the Petitioner to the compensation on account of the additional expenditure incurred towards AIWIB and Washery coal, which has been procured by the Petitioner, to overcome the shortfall in the linkage coal. Further, the Petitioner has clarified that it opted for procurement of the AIWIB and Washery coal to minimise the overall procurement cost of additional coal as the procurement cost of such coal is comparatively lower than e-auction, open market, and imported coal. Accordingly, the Petitioner is held to be entitled to the compensation towards additional expenditure incurred on account of procurement of AIWIB and Washery coal as per the methodology prescribed in paragraph 55 of the Commission's order dated 16.5.2019 in Petition No. 284/MP/2018 as observed above in Paragraph 35.

42. This issue is answered accordingly.

Issue No. 2: Does the contention of Respondent, MSEDCL with regard to insufficiency or lack of supporting detail/information survive?

43. Apart from the above submissions on merits, Respondent, MSEDCL, has also made detailed submissions on the computations of the compensation claims and the lack of supporting details/information or mismatch in such details/information during the various stages of the proceedings. However, we do not find any need to reproduce such submissions of the Respondent and the response of the Petitioner thereon, as pursuant to the direction of this Commission, both sides extensively engaged in the reconciliation exercise of such claims and upon verification of the information furnished by the Petitioner, the parties have reconciled the claims of the Petitioner to a large extent. As indicated by both sides, post reconciliation, Respondent, MSEDCL has admitted to an amount of Rs. 58.01 crore as against Rs. 58.19 crore towards the principal outstanding amount for the period from February 2015 to June 2020 claimed by the Petitioner. The difference with respect to Rs. 0.18 crore is due to non-consideration by the MSEDCL of expenditure towards incidental expenses incurred by the Petitioner towards procurement of coal. The Petitioner, in its written submission dated 4.3.2024, has submitted that GWEL is willing to waive its right to claim the differential payment of Rs. 0.18 crore in furtherance of the spirit of reconciliation and with the objective of arriving at a settlement in the matter and accepts the outstanding principal amount of Rs. 58.01 crore. Moreover, after the aforesaid reconciliation and verification of the claimed amount and pursuant to the direction of this Commission vide RoP dated 28.11.2023, Respondent, MSEDCL has already made payment of Rs. 46.41 crore to GWEL on 26.12.2023, i.e., 80% of the admitted principal differential impact of Rs. 58.01 crore. Thus, parties having already reconciled the compensation claim of the Petitioner, the contentions of MSEDCL with regard to insufficiency or lack of supporting data no longer survive. Accordingly, we

direct Respondent, MSEDCL to pay the balance principal amount after further reconciliation, if required, within a month from the date of passing of this Order.

Carrying Cost

44. The entitlement of the Petitioner to the carrying cost on the Change in Law compensation, i.e., compensation for additional cost incurred towards the procurement of AIWIB and Washery coal to overcome the linkage coal shortfall, is no longer *res-integra*. In paragraph 75 of the order dated 16.5.2019, the Commission had held that the Petitioner was entitled to carrying cost at the actual interest rate paid by the Petitioner for arranging funds or the rate of interest on working capital as per the applicable CERC Tariff Regulations or the Late Payment Surcharge rate as per the PPA, whichever is lower. Accordingly, the Commission vide Record of Proceedings for the hearing dated 28.11.2023 directed the parties to also carry out the reconciliation of the carrying cost claim. Respondent, MSEDCL by an affidavit dated 29.12.2023, computed the carrying cost at Rs. 65.48 crore as on 30.11.2023 on the principal amount of Rs. 58.01 crore subject to any difference observed between the actual rate of interest paid as submitted by the Petitioner vide auditor certificate and as per the agreement executed with lenders. In the said affidavit, MSEDCL has submitted that it considered the rate of interest for carrying cost from the financial years 2013-14 to 2023-24 as per the methodology of computation considered by the Commission in its order dated 16.5.2019 in Petition No. 284/MP/2018. MSEDCL has further stated that for verification of the actual rate of interest paid by the Petitioner, though the Petitioner submitted the auditor's certificate, MSEDCL also requires the agreements executed by the Petitioner with lending banks for actual interest paid to lenders.

45. During the course of proceedings on 16.2.2024, the Petitioner also expressed its agreement to the aforesaid reconciled amount of Rs. 65.48 crore (as on 30.11.2023) as worked out by MSEDCL on the basis of the methodology of computation of carrying cost approved by the Commission in an order dated 16.5.2019 in Petition No. 284/MP/2018. However, as regards the verification of the actual rate of interest from the agreements executed with lending banks, the Petitioner added that these agreements, as such, do not indicate the actual rates, but the Petitioner will provide the working capital lenders' certificate demonstrating the actual interest paid to the lenders in terms of these agreements. Pursuant to the liberty granted by the Commission, the parties also filed their brief written submissions. The Petitioner, in its submissions, has indicated that as per the directive of the Commission, the Petitioner has furnished the certificates from its Working capital Facility lenders to the Respondent on 20.2.2024 so as to enable MSEDCL to verify/compute the carrying cost till 30.11.2023 payable by it. For the balance period, i.e., from 1.12.2023 till the date of order, the Petitioner submitted that the carrying cost be computed as per the agreed methodology used for computation of carrying cost for the period till 30.11.2023 basis, the certificates from Working Capital Facility lenders, as per the invoice raised by the Petitioner.

46. Whereas, Respondent, MSEDCL has submitted that pursuant to the direction of the Commission, the Petitioner has submitted the certificates from its Working Capital lenders indicating the rate of interest charged on cash credit/ WCDL limits utilised by the Petitioner during the period from February 2014/March 2014 to December 2023 maintained with their bank. Based on such details, the Respondent tried to verify the actual interest rates from the lenders' certificates by comparing them with auditor certificates submitted by the Petitioner. However, during the verification, it was observed that there was a need to understand the mechanism on

the basis of which such higher interest rates were decided and charged by all consortium banks upon the Petitioner for the concerned period. As such, Respondent could not completely verify the actual rate of interest paid from these lender's certificates for want of a few more additional documents in support of the mechanism for deciding the higher interest rates by consortium of banks such as sanction letters, agreements of all consortium banks, details of overnight/1M/3M/6M/1Y/2Y/3Y base rate/ MCLR of all consortium banks or any other documents for clarification of the interest rate mechanism Accordingly, a joint meeting was held on 27.2.2024 for discussion regarding the submission of additional documents in support of the actual rate of interest and the Petitioner also agreed to submit these additional required documents after discussing with its legal team. However, no positive response was received from the Petitioner, and accordingly, Respondent requested that Petitioner be directed to cooperate with the Respondent for reconciliation of the carrying cost claim by submitting the additional documents required in support of verification of the actual rate of interest. MSEDCL has also indicated that it will be able to make the payment towards the balance principal claim of Rs.11.60 crore and the provisions of carrying cost of Rs. 64.18 crore in six equated monthly instalments considering its current financial position.

47. Considering the submissions made by the parties, it is not clear if the carrying cost is being worked out in line with paragraph 75 of the Commission's order dated 16.5.2019, i.e., the actual interest rate paid by the Petitioner for arranging funds or the rate of interest on working capital as per the applicable CERC Tariff Regulations or the Late Payment Surcharge rate as per the PPA, whichever is lower. Therefore, we deem it appropriate to direct the parties to complete the exercise of verification and reconciliation of the carrying cost at the interest rate as specified in paragraph 75 of the Commission's order dated 16.5.2019 within a timeline of 3 weeks from the

date of this order and for this purpose, the Petitioner will share all the reasonable documents with Respondent, MSEDCL. Subsequently, Respondent, MSEDCL, after completion of the above exercise within the stipulated period as indicated above, will thereafter make the payment of the entire carrying cost so worked out in six equated monthly instalment, with the first instalment to be paid within four weeks from the date of this order.

48. This issue is answered accordingly.

49. Petition No. 25/MP/2020 is disposed of in terms of the above discussions and findings.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(Jishnu Barua)
Chairperson